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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-346

WILLIAM N. ANDERSON, JOHN R. BROWNING, ERNEST L. "RED" HAGER, W. BERNARD SMITH AND EARL TOMBLIN, *Petitioners*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

APPENDIX

Relevant Docket Entries

1971

Jan. 12—INDICTMENT, filed.

Jan. 12—Order for warrants to issue.

Jan. 13—Order directing defendant Anderson be released provided he execute a bond in the sum of $5,000.00, etc. and case continued.

Jan. 13—Bond executed by defendant Anderson in sum of $5000.00, filed.

Jan. 13—Order directing defendant Browning be released provided he execute a bond in the sum of $5,000.00, etc., and case continued.

Jan. 13—Bond executed by defendant Browning in sum of $5,000.00, filed.

Jan. 13—Order directing defendant Hager be released provided he execute a bond in the sum of $5,000.00, etc. and case continued

Jan. 13—Bond executed by defendant Hager in sum of $5,000.00, filed.

Jan. 13—Order directing defendant Smith be released provided he execute a bond in the sum of $5,000.00, etc. and case continued.

Jan. 13—Bond executed by defendant Smith in sum of $5,000.00, filed.

Jan. 13—Order directing defendant Tomblin be released provided he execute a bond in the sum of $5,000.00, etc. and case continued.

Jan. 13—Bond executed by defendant Tomblin in sum of $5,000.00, filed.

Jan. 14—Order continuing arraignment of defendant Anderson to January 27, 1971.

Jan. 14—Order continuing arraignment of defendant Browning to January 27, 1971.

Jan. 14—Order continuing arraignment of defendant Hager to January 27, 1971.

Jan. 14—Order continuing arraignment of defendant Smith to January 27, 1971.

Jan. 14—Order continuing arraignment of defendant Tomblin to January 27, 1971.

Criminal No. 9520—Page 2

Jan. 27—Waiver of right to be present at hearings on motions prior to trial, executed by defendant Anderson, filed.

Jan. 27—Waiver of right to be present at hearings on motions prior to trial, executed by defendant Browning, filed.

Jan. 27—Waiver of right to be present at hearings on motions prior to trial, executed by defendant Hager, filed.

Jan. 27—Waiver of right to be present at hearings on motions prior to trial, executed by defendant Smith, filed.

Jan. 27—Waiver of right to be present at hearings on motions prior to trial, executed by defendant Tomblin, filed.

Jan. 27—Order as to defendant Anderson's motions to be filed on or before Feb. 15, 1971 and Govt. to file its response on or before Feb. 25, 1971; Bond amended to permit Deft. to travel anywhere within the continental limits of the United States.

Jan. 27—Order as to defendant Browning's motions to be filed on or before Feb. 15, 1971 and Govt. to file its response on or before Feb. 25, 1971; Bond amended to permit Deft. to travel anywhere within the continental limits of the United States.

Jan. 27—Order as to defendant Hager's motions to be filed on or before Feb. 15, 1971 and Govt. to file its response on or before Feb. 25, 1971; Bond amended to permit Deft. to travel anywhere within the continental limits of the United States.

Jan. 27—Order as to defendant Smith's motions to be filed on or before Feb. 15, 1971 and Govt. to file its response on or before Feb. 25, 1971; Bond amended to permit Deft. to travel anywhere within the continental limits of the United States.

Jan. 27—Order as to defendant Tomblin's motions to be filed on or before Feb. 15, 1971 and Govt. to file its response on or before Feb. 25, 1971; Bond amended to permit Deft. to travel anywhere within the continental limits of the United States.

Feb. 1—Certified copy of Order transferring case to Huntington docket for further proceedings.

Feb. 2—Order docketing case upon transfer from Charleston and further proceedings to be held at Huntington.

Feb. 16—Motion to Dismiss the Indictment on behalf of all defendants, filed.

Feb. 16—Motion for Discovery and Inspection on behalf of all defendants, filed.

Feb. 16—Motion for Bill of Particulars on behalf of all defendants, filed.

Feb. 16—Motion for Preliminary Hearing on behalf of all defendants, filed.

Feb. 26—Government's Response to the Various Motions filed on Feb. 16, 1971, filed.

Criminal No. 9520—Page 3

July 26—MEMORANDUM ORDER: Denying defendants Motion to Dismiss; Motion for production denied in part; Motion for Preliminary Hearing, denied; Motion for Bill of Particulars denied; and case set for trial at Huntington on August 23, 1971 at 9:30 A.M.

Aug. 4—Motion for Full Disclosure as Provided Under the Omnibus Hearing Project on behalf of all defendants, filed.

Aug. 23—ORDER: Denying defendants Motion for Full Disclosure as Provided Under the Omnibus Hearing Project.

Aug. 30—Motion for Mistrial by Defendant, John R. Browning, filed.

Sep. 13—ORDER: Directing payment of $71.42 to The Hotel Frederick for meals provided the jury on September 13, 1971.

Sep. 13—Jury Verdict of Guilty as to defendant William N. Anderson, filed.

Sep. 13—Jury Verdict of Guilty as to defendant John R. Browning, filed.

Sep. 13—Jury Verdict of Guilty as to defendant Ernest L. "Red" Hager, filed.

Sep. 13—Jury Verdict of Guilty as to defendant W. Bernard Smith, filed.

Sep. 13—Jury Verdict of Guilty as to defendant Earl Tomblin, filed.

Sep. 13—ORDER: Deft. Anderson adjudged guilty: Prob. Dept. to make pre-sent. investigation; Disposition or sentence deferred for 30 days; and bond to continue.

Sep. 13—ORDER: Deft. Browning adjudged guilty; Prob. Dept. to make pre-sent. investigation; Disposition or sentence deferred for 30 days; and bond to continue.

Sep. 13—ORDER: Deft. Hager adjudged guilty; Prob. Dept. to make pre-sent. investigation; Disposition or sentence deferred for 30 days; and bond to continue.

Sep. 13—ORDER: Deft. Smith adjudged guilty; Prob. Dept. to make pre-sent. investigation; Disposition or sentence deferred for 30 days; and bond to continue.

Sep. 13—ORDER: Deft. Tomblin adjudged guilty; Prob. Dept. to make pre-sent. investigation; Disposition or sentence deferred for 30 days; and bond to continue

Sep. 17—Motion for a New Trial on behalf of all defendants, filed.

Sep. 17—Motion for a New Trial on behalf of defendant John R. Browning, filed.

Sep. 30—MEMORANDUM ORDER: Denying joint motion of the defendants for a new trial, as well as the separate motion of the defendant John R. Browning; Judgment of conviction of each defendant affirmed as reflected by orders entered on Sep. 13, 1971; and defendants to appear before the Court in Charleston on Oct. 13, 1971 for final disposition.

Criminal No. 9520—Page 4

Oct. 5—Notice of Appeal of all defendants from the order entered on Sep. 30, 1971, denying defendants' motions for a new trial and affirming conviction, as reflected by order dated Sep. 13, 1971, filed.

Oct. 8—Statement of Appellants, Describing Portion of Transcript to be Included in the Record and Statement of Issues to be Presented on the Appeal, filed.

Oct. 14—JUDGMENT AND COMMITMENT as to Deft. Anderson: 10 years pursuant to 18:4208(b), etc., and bond pending Appeal in sum of $5,000.00, filed.

Oct. 14—JUDGMENT AND COMMITMENT as to Deft. Browning: 10 years pursuant to 18:4208(b), etc., and bond pending Appeal in sum of $5,000.00, filed.

Oct. 14—JUDGMENT AND COMMITMENT as to Deft. Hager: 10 years pursuant to 18:4208(b), etc., and bond pending Appeal in sum of $5,000.00, filed.

Oct. 14—JUDGMENT AND COMMITMENT as to Deft. Smith: 10 years pursuant to 18:4208(b), etc., and bond pending Appeal in sum of $5,000.00, filed.

Oct. 14—JUDGMENT AND COMMITMENT as to Deft. Tomblin: 10 years pursuant to 18:4208(b), etc., and bond pending Appeal in sum of $5,000.00, filed.

Oct. 19—Notice of Appeal on behalf of all defendants from the Judgment and Commitment Order entered on October 14, 1971, filed.

Oct. 19—Statement of Appellants, Describing Portion of Transcript to be Included in the Record and Statement of Issues to be Presented on the Appeal, filed.

Nov. 18—ORDER: Granting extension of time for transmitting Record on Appeal to the Fourth Circuit Court of Appeals to and including January 17, 1972.

Nov. 19—Motion of Thomas A. Tomblin, Clerk of County Court of Logan County, for the return of Precinct Books Numbers 86 and 96, which were introduced in evidence in the trial of this case, filed.

Dec. 2—ORDER: Overruling motion of Thomas A. Tomblin, Clerk, for the return of certain official records entered into evidence in the trial of this case, etc.

1972

Jan. 14—To preparing, certifying and mailing Record on Appeal. Transcript of proceedings and exhibits to be mailed when completed.

Aug. 29—Reporter's Transcript of proceedings, Volumes 1 through VII, filed.

Sept. 5—Reporter's Transcript of proceedings, Volumes VIII, IX and X, filed.

Sept. 5—Reporter's Shorthand Notes of all proceedings, filed.

Sept. 5—To mailing Reporter's Transcript of proceedings and Exhibits to Fourth Circuit Court of Appeals at Richmond, Virginia, and copy of transmittal letter to counsel of record mailed this date.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON

No. 71-1 Ch
18 U.S.C. Section 241

UNITED STATES OF AMERICA,

v.

WILLIAM N. ANDERSON
JOHN R. BROWNING
ERNEST L. "RED" HAGER
W. BERNARD SMITH
EARL TOMBLIN

Motion to Dismiss

Comes the defendants, William N. Anderson, John R. Browning, Ernest L. "Red" Hager, W. Bernard Smith and Earl Tomblin, and individually and collectively respectfully move the Court to dismiss the indictment returned against them, on the following grounds:

1. The indictment fails to describe and particularize the alleged criminal violation which is asserted as forming the basis of the indictment with sufficient definiteness and certainty to inform any defendant of the precise act or acts which it is alleged he did or performed within the context of said alleged violation. There is such vagueness and indefiniteness in the statement of alleged acts that each defendant is not so informed of the nature of the accusations as to enable him to prepare his proper defense.

2. The indictment and the allegations thereof are so vague, general and indefinite that it violates the rights guaranteed to defendants by the Fifth and Sixth Amendments to the Constitution of the United States, and is couched in such general terms and language that not only is each defendant unable to prepare his defense, but is

also unable to identify the matters charged against him with such specificity as would enable him to plead an acquittal or conviction as a bar to any other proceedings against him, based on the matters or things, or any of them, on which said indictment is based.

3. The allegations of the indictment, purporting to charge and described acts of criminality upon the part of any one or all of the defendants, are mere legal conclusions without supporting facts and do not allege an offense against, or a violation of, the laws of the United States of America, and more particularly 18 U.S.C. 241.

WHEREFORE, said defendants pray that the indictment be dismissed.

Dated this —— day of February, 1971.

..... *Of Counsel*
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..... *Of Counsel*
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..... *Of Counsel*
GREENE, KETCHUM & BAKER
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Huntington, West Virginia

[Certificate of Service omitted]

[Caption omitted]

Motion for Discovery and Inspection

The defendants, William M. [sic] Anderson, John R. Browning, Ernest L. "Red" Hager, W. Bernard Smith and Earl Tomblin, move the Court to order W. Warren Upton, the United States Attorney for the Southern District of West Virginia:

1. To produce and permit the defendants to inspect and copy or photograph written or recorded statements of any one of the said defendants, or co-conspirators, or copies or transcripts thereof within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may be known to the attorney for the government.

2. To produce and to permit the defendants to inspect and copy or photograph any papers, documents, tangible objects, official records or documents pertaining to the primary election held within Logan County, West Virginia, on the 12th day of May, 1970, including, but not limited to, ballots, voting records, election slates, poll slips, list of voters and other pertinent records in relation to the said primary election, which are in the possession or under the control of the government.

3. To produce and to permit the defendants to inspect and copy or photograph the record and minutes of the grand jury, which returned the indictment, including grand jury testimony.

4. To produce and permit the defendants to inspect and copy or photograph any statements, records, documents, papers, tangible objects, or copies or portions thereof which are in the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government, which would tend to exculpate, ab-

solve or exonerate any one of the defendants or which are material to any one of the defendants in the preparation of their defense.

/s/ ———— *Of Counsel*
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/s/ ———— *Of Counsel*
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[Certificate of Service omitted]

[Caption omitted]

Motion for Bill of Particulars

Comes defendants, William N. Anderson, John R. Browning, Ernest L. "Red" Hager, W. Bernard Smith and Earl Tomblin, and respectfully move the Court to require the United States Attorney to furnish said defendants with a bill of particulars stating the following information:

1. With respect to numbered paragraph 9 of the indictment, a specific statement as to when, where and by what specific acts, utterances or deeds, involving what persons,

if any, in addition to those named in that paragraph, and in what context or connection, between the dates of May 1, 1970, and January 12, 1971, were the acts upon which the allegation of willful, knowing and unlawful conspiracy to injure and oppress qualified voters at the 1970 Primary Election, claimed to have been done, committed or performed.

2. With respect to numbered paragraph 9 of the indictment, when, where, and by what means was the claimed conspiratorial act involving injuring and oppressing qualified voters in the free exercise and enjoyment of certain rights and privileges secured to them by the constitution and laws of the United States, and particularly the right of suffrage, done committed or performed.

3. Where, when and by what means did each of the defendants herein violate the laws of West Virginia and the United States, and what specific act or acts did each of the said defendants or any of them violate?

4. Where, when and by way [sic] means did any of the defendants herein named do or cause to be done, any act or acts in causing a voter to cast a ballot in violation of the laws of West Virginia and the United States? State the name of the person or persons who cast such fraudulent and fictitious votes, and state in what particular the vote was fraudulent or in what particular the vote was fictitious.

5. List the time, place and persons present when the alleged conspiracy was formed, including those persons not indicted but who were co-conspirators known to the grand jury, and state, in detail, the part each of the defendants and the so-called co-conspirators took in said conspiracy.

6. Give the names and addresses of those persons who were injured and prevented from exercising their right to have their votes cast, and state how each of the defendants named herein participated in this and how each of said defendants participated in impairing, lessening, diminish-

ing, diluting and destroying the value of or effecting the votes legally, properly and honestly cast.

7. State what acts each or any of the defendants performed that caused illegal, fraudulent and fictitious ballots to be counted, returned and certified as a part of the total votes cast in the Primary Election.

8. State which Primary Election the indictment has reference to, and state what candidates for what federal offices were the victims of the alleged conspiratorial act or acts.

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[Certificate of Service Omitted]

[Caption Omitted]

Motion for Preliminary Hearing

Defendants, pursuant to the provisions and rights bestowed on them by Rule 5(c) of the Federal Rules of Criminal Procedure, move the Court to direct that they have a preliminary hearing to protect their rights under the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States.

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[Certificate of Service Omitted]

[Caption Omitted]

Government's Response to the Various Motions Filed

Comes now the United States of America by Robert B. King, Assistant United States Attorney for the Southern District of West Virginia, in response to the various motions filed by the defendants and states as follows:

I. Motion to Dismiss

The indictment in this matter was drafted pursuant to the Federal Rules of Criminal Procedure, charges all necessary elements for an offense under Title 18, United States Code, Section 241, is sufficient in all respects, and is not subject to challenge by the defendants.

II. Motion for Discovery and Inspection

1. The Government is not in possession of any written or recorded statements made by any of the defendants and accordingly none can be furnished to the defendants. The Government would resist providing the defendants with statements made by any unnamed co-conspirators in this matter, except as provided under the Jencks Act, Title 18, United States Code, Section 3500, and submits that the efforts of the defendants to secure such statements is an attempt to secure names of prospective witnesses, which attempt the Government resists most vigorously.

2. The official file of the Circuit Court of Logan County pertaining to an election contest, styled *Skaggs* v. *Hager*, No. 5454, was subpoenaed by the Grand Jury investigating the matters involved in this case and is presently in possession of that Grand Jury. The Government has no objection to the defendants inspecting or copying the contents of that file so long as the integrity and secrecy of the Grand Jury proceedings in this matter are protected by an appropriate court order.

3. The Government resists the production to the defendants of Grand Jury testimony relative to this matter

except insofar as it may fall within the purview of the Jencks Act, Title 18, United States Code, Section 3500.

4. The Government is aware of its duty under *Brady* v. *Maryland* and at this time is not aware of any exculpatory material contained in the Government's file. However, if the Government should discover in the future any exculpatory evidence, either in its file or by further investigation, it will be turned over to counsel for the defendants.

III. Motion for Preliminary Hearing

The defendants are not entitled to a preliminary hearing in this matter. This indictment was returned by a Grand Jury of this Court, bench warrants were properly issued upon it, and the defendants were not arrested until this indictment was returned. This indictment constitutes probable cause and calls for a trial on the merits of this case.

IV. Motion for Bill of Particulars

Although the Government is willing to provide the defendants with more details concerning the Government's case, the Government calls upon the defendants to frame their inquiries in such form that they may be answered without calling upon the Government to divulge its entire case, along with a list of its proposed witnesses. The defendants' present request for a Bill of Particulars is drawn in such a manner as to constitute a "fishing expedition" by the defendants and the Government would not be comfortable with any answers it might provide without opening its entire file in this matter to the defendants. It is not the duty of the Government, under the law, to do this, and the Court should not require that the Government turn its file over to the defendants as a result of this broad and all encompassing request for a Bill of Particulars.

Original Signed by Robert B. King

Robert B. King
Assistant U. S. Attorney

[Certificate of Service Omitted]

[Caption Omitted]

Memorandum Order

The defendants herein have moved the Court to dismiss this indictment on the grounds that it fails to describe and particularize the alleged criminal violation asserted as a basis for the indictment and that it fails to delineate the alleged offense with sufficient specificity and particularity as would enable the defendants to plead an acquittal or conviction as a bar to any future proceedings based upon the same activity. On consideration of the motion in the light of the memoranda filed, the Court is of the opinion that the indictment meets the requirements of the Federal Rules of Criminal Procedure, adequately charges the defendants with the offense under Title 18 U.S.C. Section 241, and accordingly IT IS ORDERED that the motion to dismiss the indictment be and the same is hereby denied.

The defendants have moved that the Government be required to produce certain material for their inspection. In its response the Government states that it is not in possession of any written or recorded statements made by any of the defendants. The Government declines to furnish statements of any unnamed co-conspirators and also resists production of the grand jury testimony requested by the defendants. The Court is of the opinion that the defendants are not entitled to the statements sought nor have they demonstrated any particularized need which would require that the grand jury testimony be furnished to them except insofar as it might fall within the ambit of 18 U.S.C. Section 3500. Accordingly IT IS ORDERED that the motion for production be and the same is hereby denied with the exception that the defendants may inspect the file of the Circuit Court of Logan County in the case of *Skaggs* v. *Hager*, No. 5454, presently in the file of the grand jury of this Court.

The defendants have also moved for a preliminary hearing, but since it appears that the indictment itself consti-

tutes probable cause in this case, IT IS ORDERED that this motion be denied.

The defendants have also moved for a bill of particulars, and upon consideration thereof, the Court is of the opinion that the information sought thereby would require that the Government disclose to the defendants the details, witnesses and minutiae of the Government's case against the defendants. The circumstances of this case do not require nor justify such a disclosure on the part of the Government, and accordingly IT IS ORDERED that the motion for a bill of particulars be and the same is hereby denied.

IT IS FURTHER ORDERED that this case be set for trial at Huntington on August 23, 1971, at 9:30 a.m.

The Clerk is directed to send a certified copy of this order to counsel of record as well as to each of the defendants.

Enter: July 26, 1971.
(Signature illegible)
District Judge

(Caption Omitted)

Motion for Full Disclosure as Provided Under the Omnibus Hearing Project

Counsel for the defendants represents to the Court that they have earnestly and diligently attempted to determine what the defendants did, or failed to do, that violated the Civil Rights Act, as set forth in the said indictment in the above-styled case, and counsel further represents to the Court that the indictment is so vague and indefinite that it is impossible adequately to prepare a defense or properly advise their clients.

Counsel for the defendants jointly and severally move the Court to set a pre-trial conference for the purpose of:

1. Requiring the government to furnish opposing counsel all documents and exhibits expected to be used in the said trial.

2. Requiring the government to furnish a list of anticipated witnesses expected to be used, together with a sentence summary of their testimony.

3. The defendants agree to furnish the government attorneys copies of documents and exhibits expected to be used in the said trial.

4. The defendants agree to furnish the government a list of anticipated witnesses expected to be used, together with a sentence summary of their testimony.

Counsel for the defendants further represent to the Court that this motion is not made for the purpose of delay of the said trial, but is for the sole purpose of being able to properly represent their clients on the date set for trial.

WILLIAM N. ANDERSON,
JOHN R. BROWNING,
ERNEST L. "RED" HAGER,
W. BERNARD SMITH, and
EARL TOMBLIN,
Defendants.

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By .....

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By .....

[Caption Omitted]

Order

On the 2nd day of August, 1971, counsel for defendants filed a Motion for Full Disclosure as Provided Under the Omnibus Hearing Project.

And after mature consideration of this motion, the Court is of the opinion that the motion should be denied, as explained in the Court's letter to counsel, dated August 19, 1971. In accord therewith, it is ORDERED that the said motion be, and the same is hereby, denied.

Enter:

.....
United States District Judge

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Government's Opening Statement

[4] This case, as you may already know from having the indictment read to you, involves an election. The statute which is involved in the indictment, which the indictment charges these defendants with violating, is a statute which makes it a federal crime to conspire to violate the civil rights of citizens of the United States, one of the rights being, of course, to vote, to have your vote counted honestly and given its full effect.

That right is protected under the particular statute involved and that is what this indictment pertains to. It charges these defendants with violating the civil rights of the citizens of Logan County who cast ballots in the primary election in May of 1970, who actually did cast ballots. It charges them with violating their rights in that the indictment charges that those votes honestly cast were diluted by false and fictitious votes and ballots which were also cast, which were thrown into the pot with them.

The reason I tried to explain that, it may not be [5] very clear. This isn't a case of buying votes. The indictment doesn't charge that any votes were bought. It charges false and fictitious votes were cast or caused to be cast by these defendants and caused to be counted by these defendants. It is more in the nature of a stuffing the ballot box situation. I think it could be characterized not as buying the election; more like stealing the election.

As I said, it charges these defendants with causing the fictitious and phony votes to be cast. It charges them with having them counted, and there will be evidence on the part of the government that they were cast on behalf of these defendants and that they were counted through a long and involved process that actually involved an election contest, a trial, so to speak, a proceeding in Logan County before the County Court of Logan County, an election contest involving two particular candidates who were on the ballot in that election, two democratic candidates for the County Court.

One was a man by the name of Okey Hager, who I believe the evidence will show was the father of one of these defendants. The other was a man by the name of Neal Scaggs, and those two men were involved in this election contest and the evidence will show that they fought this thing through the election contest as to whether or not the votes cast in the [6] Mount Gay precinct, which is the precinct that basically this indictment deals with, as to whether or not the votes in the Mount Gay precinct should be counted, as to whether or not there were so many false votes that the whole precinct should have been thrown out.

The reason for the contest, the evidence will show, was that the result of that County Court race in Logan County turned on whether or not the votes in this particular precinct were to be counted. In other words, if you counted them, I believe Mr. Hager was going to win. If you didn't count them, then Mr. Scaggs was going to win.

I believe the evidence will show, frankly, that that election contest was full of perjurious testimony, full of lies. Some of it, the evidence will show, was solicited and caused by these defendants. The evidence will also show, I am confident, that Mr. Scaggs was the winner in the election, in other words, if the Mount Gay precinct was thrown out.

MR. BAER: If the Court please, this is a complete misstatement.

THE COURT: All right, gentlmen. The jury will disregard that. Let me point out to the jury that the opening statement of counsel is not evidence in the case but they merely are outlining what they think that they will introduce into [7] evidence. However, the jury should disregard the last statement of Mr. King.

MR. KING: I apologize, your Honor, and to the jury. As his Honor says, what I say is not evidence for you to consider. The evidence will come to you through the witnesses that appear here on the witness stand, but in any event this election contest went all the way to the Supreme Court of West Virginia before it was resolved, and it was resolved by the votes over in Mount Gay being duly certified and being counted.

I believe our evidence will show you that at the time of the May 12th primary election at Mount Gay there were 541 registered voters in the Mount Gay precinct in Logan County. The officially certified result, tabulation of votes cast in that precinct, reflected I believe that 401 of the 541 registered voters cast ballots on that date.

We will, I submit to you, show you by our evidence that the 401 figure is fraudulent, fictitious, and that it was a physical impossibility once you hear the evidence, and it may be long and meticulous evidence, but we submit we will show you that the 401 figure was fraudulent, that there weren't that many people voted at that precinct on that

day. In fact, as I mentioned before, that precinct, at least in one contest, at least in one of the areas, the County Court race, changed the [8] result of the election.

We, of course, don't contend that those were the only offices that the fictitious votes were cast for. There were federal candidates and candidates for other offices who were also on the ballot, but as I said, our evidence will demonstrate to you, or attempt to demonstrate to you, that these defendants had the votes cast, they had the poll slips destroyed so that the records wouldn't show who had actually voted, and that they, through the long drawn out process that I have described, had the votes counted.

The government will have some witnesses in here who testified over there in that election contest. Some of them testified on behalf of the defendants and some of them are going to tell a different story in this courtroom than they told over in Logan County. Some of them are going to tell you what happened.

MR. GREENE: I object. They did not testify in favor of the defendants.

THE COURT: Again we will just have to wait and see, Mr. Greene. The jury has been admonished that what these gentlemen say is not evidence in the case.

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[337] **Calvin Napier**

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. King:

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[343] Q. Did Mr. Tomblin come to your home? A. He came to my home, yes, sir.

Q. Was he alone? A. The first time I believe he was alone. Nobody was with him, and he came in and we discussed it.

Q. What did you discuss? A. Well, we discussed about me working in the house at Mount Gay and if I was going to work in the house at Mount Gay.

Q. What else did you discuss? A. Well, he told me that they pretty well had the house set up and wanted to know if I would go along with what they wanted to do, and I told him I had to study it over.

Q. Did you have any further conversation with him there that day? A. No. Well, yes. We talked about my marital troubles.

Q. Your what? A. My wife and I, we were having troubles, and we talked about that. He said he could probably help me out with that.

Q. Did he explain to you how he could help you out? A. Well, he said he would go to the judge, he told me, talk to the judge about it.

Q. Did you discuss anything else with him there? A. No, not at that time we didn't discuss anything like [344] that.

Q. You say a week before the election? A. Right.

Q. How long was Mr. Tomblin at your house? A. Ten minutes, maybe fifteen minutes.

Q. You say you told him that you were going to study it over? A. Right.

Q. Did you make arrangements to meet him again? A. He came to my house, it was either Thursday or Friday before the election, and he came up there and he had Bob Davis with him, a deputy, and Bob stayed out in the car when he came in.

Q. Who else was at your home? Anybody? A. Nobody that I recall.

Q. What happened on that occasion? A. Well, we discussed the election and he asked me what I would take to go along with the democrats in the house, that the house was set up, and wanted to know what I would take.

Q. What did you tell him? A. I told him I would take $300, and he give me two $50 bills.

Q. Did you say Mr. Tomblin said they had the house pretty [345] well set up? A. Yes, sir. He told me who all was going to work in it.

Q. What did that mean to you, having the house set up? A. Well, he had everything set up to where they could do anything they wanted to do in the house.

Q. You say he told you who was going to work in it? A. Yes.

Q. Who did he tell you was going to work in it? A. Cecil Elswick as a republican commissioner, Mae Stollings as a democrat commissioner, Minerva Richards as democrat commissioner and Janet Sullins as a democrat clerk.

Q. You say Elswick was a republican commissioner? A. Yes, sir.

Q. Had he been republican commissioner before? A. No, sir. He had always been a democrat till he changed over and come in the house as a republican election official.

Q. Did you discuss that matter with Mr. Tomblin? A. No, sir, I don't believe I did.

Q. You say he gave you two $50 bills? A. Yes, sir.

Q. And you say you had asked for 300? A. Yes, sir. He give me $200 when I arrived at the [346] polls on Tuesday morning, May 12th. He was standing there with Oval Damron, the Prosecuting Attorney, and took me beside the building and give me $200 in new dollar bills in $100 packages.

Q. Getting back to Friday when you discussed the money and he gave you the two $50 bills, did you discuss your marital problems with your wife that day? A. Yes, we did, and he also told me, reminded me again that he had—that they had the prosecuting attorney and the judgeship and he would go with me and talk to them about my marital troubles.

Q. What kind of troubles were these you were going to talk about? Were there papers outstanding? A. There was papers outstanding for me, to be served on me for separate maintenance, and he said he had the papers in

his pocket. He showed me some type of papers. I didn't read it but I took them for granted.

Q. Were they served on you? A. They were served on me after the election.

Q. Did you discuss any other matters on that Friday? A. I was out of a job and he told me he would help me get a job at the Board of Education.

Q. Did Mr. Tomblin know you were a republican? A. Yes, sir.

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[357] A. Well, you could hear the voting machine bell ring on it. Whenever you vote a machine, on your voting machines, you close the curtain, you vote the machine, and then you open the curtains, you bring the lever back and it makes a tone of a bell ringing. Just one bell. Not continuous bells. Just one bell.

Q. Could you hear that bell from where you were seated? A. Yes, you could hear it very distinctly.

Q. And you say you heard it when there weren't any voters? A. Yes, when there wasn't any voters in there.

Q. Who was at the voting machine when this happened, if you know? A. Mae Stollings and Cecil Elswick.

Q. How many times did this happen, sir, to the best of your recollection? A. Well, it happened in the morning. I couldn't give you no definite figure how many times it happened during the day, but it happened during the day, at morning, noon and evening.

Q. Mr. Napier, do you have any idea how many people actually voted there that day?

MR. BAER: Objection, your Honor.

THE COURT: On what ground, Mr. Baer?

[358] MR. BAER: Unless it is shown that he kept some sort of count himself on it. I do not feel it is proper for this man to give an estimate.

THE COURT: I think he could back it up. Overruled.

A. Well, I would say they was right around 275; right around 275.

Q. Were you there, Mr. Napier, when the polls closed? A. Yes, sir.

Q. Was that at 7:30? A. At 7:30.

Q. Were you there when the voting machines were opened or the tabulations were taken? A. Yes, sir.

Q. Do you recall how many votes were recorded on those machines? A. They were 401 all told.

Q. Do you recall how many were on each of the two machines? You said there were two machines. A. It seems to me the machine was broke down had around thirty-two votes on it. It was in the thirties. I am pretty sure it was thirty-two.

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[366] Q. All right, sir. How did this meeting happen to take place? How were you notified to come in? A. Ersel Stollings called me by telephone and said they was a meeting down there and we went down. I went down, and the rest of the election officers was there.

Q. Was this in the day or night? A. It was in the evening.

Q. In the evening. What do you mean by the evening? A. Well, around 6 o'clock, 7 o'clock something in that vicinity.

Q. And where did this meeting take place? A. In the conference room at the sheriff's office.

Q. Which is where, sir? A. From Mr. Tomblin's office it was direct to the right of it.

Q. In the Courthouse? A. In the Courthouse, yes.

Q. Who was there besides you and Mr. Tomblin and [367] Mr. Hager, you have mentioned. A. Cecil Elswick, Janet Sullins, Minerva Richards and Mae Stollings.

Q. And what happened at that meeting, sir? A. Well, it was discussed that we were told by Mr. Tomblin and Mr. Hager that—

Mr. Greene: I object to the hearsay testimony, your Honor, as to Mr. Hager. I don't know who he is.

The Witness: Mr. Ernest Hager.

MR. GREENE: Oh, I see. All right.

THE COURT: All right.

A. That we all would have to stick together, and if we stick together there could nothing be done.

Q. Stick together about what, sir? A. About what our statements would be for the contest.

Q. What contest are you talking about? A. That was a contest between Neal Scaggs and Okey Hager.

Q. How were you supposed to stick together? How was this discussed? A. All of us tell the same story. All of us to tell the same story and say Garrett Sullins had voted.

THE COURT: Say what, sir?

[368] THE WITNESS: To say that Garrett Sullins had voted at 2:30 in the afternoon that day or approximately 2:30 in the afternoon, that he had slipped out of the hospital and come in with a raincoat drooped over his shoulders and his head and he had voted, which the man did not vote.

Q. What else were you told by Mr. Hager and Mr. Tomblin? A. Another thing was told us, when we come up for the contest for us not to answer any questions that was contrary to what we had to say, and if a question showed up for us to look at Mr. Hager, Okey Hager, the County Court member, and he would shake his head yes or no for us to answer.

MR. BECKETT: Your Honor, it isn't clear to me who was making these statements.

THE COURT: Either Mr. Hager or Mr. Tomblin.

MR. BECKETT: Which one?

THE COURT: Who made that statement to you?

THE WITNESS: They was both talking to us during the day and I couldn't actually say, put my finger on either one of them to say one of them said it. They was both talking to us that day.

THE COURT: Either Mr. Tomblin or Mr. Hager?

THE WITNESS: Yes.

Q. Whose questions were they talking about? Did they [369] tell you whose questions you would be concerned with? A. Mr. Staker's

Q. Who is Mr. Staker? A. He was the lawyer that represented Neal Scaggs.

Q. And those are the questions that you are referring to? A. Yes, sir.

Q. What else happened at that meeting, if anything, sir A. Well, that's about all I can recall.

Q. How long did the meeting last? A. Oh, not over half an hour.

Q. Did you ask any question? A. No, sir.

Q. Were any questions asked? A. No, sir, not as far as I can remember.

Q. Did you say anything at all that you can recall? A. No, sir.

Q. After that meeting, Mr. Napier, when was the next occasion that you can recall that anything came up with regard to the election or the election contest? A. Well, it was approximately two weeks before the contest I got a telephone call to come to Logan to the sheriff's office and I went down and Cecil Elswick met me.

Q. At the sheriff's office? [370] A. At the sheriff's office, and said they had some affidavits for us to sign over at Senator Bernard Smith's office.

Q. What did you do then, sir? A. Well, Cecil Elswick and I went to Mr. Smith's office and he wasn't in and we waited out on the street for him to come by and he came by in possibly five or ten minutes after we was out there, and we went up to his office and talked about ten minutes, maybe fifteen minutes, and discussed the election and a few other things, and then this statement was produced to me to sign concerning the election.

Q. Who produced the statement? A. Mr. Smith, Senator Smith.

Mr. King: May I have a document marked, your Honor?

The Court: All right, sir.

THE CLERK: Government's Exhibit Number 19 is marked for identification.

MR. BECKETT: No objection.

MR. KING: No objection, I understand, your Honor.

THE COURT: All right.

THE CLERK: Government's Exhibit 19 admitted in evidence.

[375] Q. Was it the first day when Deputy Stollings took you to the conference room? A. Yes.

Q. What time of day was that? A. Around 9:30, somewhere along there. We hadn't been there too long.

Q. You say this was the same conference room you were in earlier? A. Yes, it was.

Q. What happened after you got to that conference room? Who spoke? A. Well, there was nobody in there when we first got there but Mr. Ernest Hager and Mr. Tomblin come in there after we was there a while and they told us what we should say about the testimony.

Q. What did they tell you? A. Briefed us what we should say about Garrett Sullins and all of us sticking together and telling the same story, and when we are asked a question if we are going to answer it or not, look at Mr. Hager of the County Court.

Q. Did they tell you what questions they would ask on that occasion? A. No. Mr. Staker would ask the questions.

[376] Q. How long were you in the conference room there that day? A. Well, we were there till 12 o'clock. Then we come back again after that and I don't know for sure what time we left that evening.

Q. Were you kept in the conference room all day? A. Yes, approximately all day.

Q. You say you think you came back the second day? A. I believe we did, yes.

Q. How about the third day? A. I know it was either two or three days, sir, that we came back.

Q. Were you ever called to testify on those first two or three days? A. No, we was not. No.

Q. Getting back to the conference room there on the first day, Mr. Napier, you say that Mr. Tomblin and Mr. Hager, Ernest Hager, told you all to stick together? A. Right.

Q. Did they explain what they meant by sticking together? A. Well—

MR. BAER: If the Court please, I wish to object to the leading nature of this interrogation. He can ask questions [377] without leading him as to who told what and the nature of it.

THE COURT: He stated on two or three occasions he had already said stick together, and he is going to explain what he means by that.

MR. BECKETT: Not explain what his interpretation was but what they said, what was said to this witness.

MR. KING: That's what I asked him, your Honor.

MR. BAER: No, it wasn't.

THE COURT: Confine it to what they told you in that regard.

THE WITNESS: How do you mean, sir?

THE COURT: Ask the question.

MR. KING: I will ask the court reporter to read the question.

MR. BECKETT: Just go ahead.

Q. What did Mr. Hager and Mr. Tomlin tell you with regard to sticking together? A. Well, they told us if we stuck together and we all told the same story, that nothing could be done.

Q. Did they tell you what the story was to be? A. Well, like Garrett Sullins voting, for one thing, and if we would stick together that we could not be convicted of nothing because we had the County Court, the Judge and the [378] Prosecuting Attorney and the Sheriff.

Q. Mr. Napier, have you ever heard of a woman by the name of Essie Stollings? A. Yes, I have.

Q. How long have you known her, or do you know her? A. I just know of her. That's about it.

Q. Was her name ever brought up in these discussions at the Courthouse? A. Yes. We was out in the hall and Cecil Elswick and I were talking and Mr. Tomblin and Mr. Hager.

MR. BECKETT: May we have the time and place, your Honor?

THE COURT: Go ahead and tell them what day this took place.

THE WITNESS: Well, it was during the first of the recount.

THE COURT: The recount?

THE WITNESS: I mean the contest, not the recount. We were standing in the hall and she had already testified.

Q. In the hall of the Courthouse? A. Right outside the contest room, where they were having the contest room, and Cecil Elswick brought up getting a perjury warrant for Mrs. Stollings so the rest of the witnesses wouldn't [379] testify.

MR. KING: Mr. Beckett didn't hear your answer.

MR. BECKETT: The person who made that statement.

THE COURT: Cecil Elswick.

Q. What happened then? A. Mr. Tomblin and Mr. Hager said it was a good idea to get the warrant, and they proceeded to get the warrant and she was arrested.

Q. You say that was one of the first days when you were down there? A. Yes, it was.

Q. Do you recall what time of the day it was? A. It was right around noon.

Q. Mr. Napier, did you ever testify in that contest? A. Yes, I did.

Q. Who called you as a witness? A. Mr. Staker.

Q. Why did Mr. Staker call you as a witness?

MR. GREENE: I object, your Honor.

THE COURT: Objection sustained.

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[410] Cross-Examination

By Mr. Baer:

. . . . . .

[462] Q. How would you have stolen the votes? A. I've never stolen a vote, I'll have you to know.

Q. All you do, according to your testimony, is sit quietly by and let somebody else steal them. A. I was the receiving clerk.

Q. Will you please answer my question? I will ask you if you did just sit quietly by and let somebody else steal them. A. What was I to do?

THE COURT: Just answer the question.

Q. Didn't you? A. Yes, I did.

Q. And that's what you were paid to do? A. I was paid to keep my head turned and see nothing.

Q. Before you went in that morning to operate as a clerk of the Republican party did you not take an oath? A. Yes, sir.

Q. And doesn't that oath read as follows? Didn't you take the following oath that morning? "State of West Virginia, County of Logan—I, Calvin Napier, do solemnly swear that I will faithfully and honestly discharge my duties as clerk of election now about to be held in precinct number 86-96, in Island Creek District, County of Logan, State of West Virginia; that I will not disclose nor communicate to any person how any elector [463] voted, or how any ballot was folded, marked, printed or stamped; that I do not have any promise, agreement or understanding that I am to be appointed as deputy by any candidate to be voted for at such election; that I do not have any agreement, understanding or arrangement that I shall receive any sum of money or any portion of the salary, fees or emoluments from any office for which any candidate is to be voted for at such election, should such candidate be elected at such election or any subsequent election. So help me God." A. That was the oath we took.

Q. And you swore to that? A. Yes, sir.

Q. And this is the first thing you did when you got there, wasn't it? A. I didn't do nothing dishonest.

Q. You signed that oath the first thing you did when you got there that morning, didn't you? A. Yes, sir; before we opened the polls.

Q. Before you opened the polls everyone that was in there signed an oath that they would faithfully and honestly discharge their duties? A. Which I did.

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[486] Redirect Examination

By Mr. King:

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[488] THE COURT: Did you ever talk to Mr. Browning?

THE WITNESS: No, sir.

THE COURT: All right.

Q. Mr. Napier, I am handing you what is in evidence here as Government's Exhibit Number 2, certificate of results of the Mount Gay precinct in the primary election on May 12th. I wonder if you would look at that exhibit and tell the Court and jury how many votes Senator Byrd received as candidate for United States Senator in that precinct that day, sir. A. 342.

Q. How many did Mr. Hechler receive as a candidate for United States Congress? A. 314.

Q. How many did Lloyd Jackson receive as a candidate for State Senator? A. 280.

Q. How many did Mr. Gilliam receive as candidate for the House of Delegates? A. 232.

Q. How many did Okey Hager receive as a candidate for the County Court of Logan County? [489] A. 292.

Q. How many did Mr. Leroy Counts receive as a candidate for County Court of Logan County? A. 296.

Q. How many did Garrett Sullins receive as candidate for justice of the peace? A. 328.

Q. I believe you said earlier, but how many did Elwood Sloan receive as a candidate for constable? A. 229.

Q. Mr. Napier, do you know whether or not those names that you just read were the individuals who were on the Hager slate?

MR. BECKETT: Objection, your Honor. This witness has testified he had no knowledge of who was on it.

THE COURT: I think he did.

MR. KING: He said he didn't see the slate, your Honor.

MR. BECKETT: He said he didn't know who was on it.

THE COURT: I will sustain the objection.

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[496] **Garrett Sullins**

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. King:

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[501] Q. What is your wife's name, sir? A. Janet.

Q. Janet Sullins? A. Janet Sullins.

Q. Mr. Sullins, did you campaign for election? A. Yes, sir, I campaigned.

Q. When the election came around where were you, sir? A. In a hospital.

Q. What hospital? A. Holden.

Q. Holden Hospital? A. Holden Hospital.

Q. When did you go in the hospital? A. It was on—well, the election was Tuesday and I went in on Sunday night.

Q. How long did you stay in the hospital? A. Around five days.

Q. All right, sir. After you had gone in the hospital did you ever have occasion to discuss the election with Earl Tomblin? A. I discussed it with him one night. Him and Cecil Elswick come to the hospital.

Q. What night? [502] A. It was the night before the election.

Q. Would that have been Monday night? A. It would have been Monday night.

Q. Do you recall what time of the night it was that they came to the hospital? A. I would say approximately around 10:30 or 11 o'clock.

Q. Was the hospital open to visitors at that time? A. Well, they usually could come on in. It is usually open when anyone wants to come in.

Q. You say Cecil Elswick and Earl Tomblin? A. Yes, sir. They were together.

Q. How long did you talk with them that night? A. Not too long because I had just had medication and I was feeling bad, but I would say we talked no longer than ten minutes.

Q. What was your ailment? Why were you in the hospital? A. Bleeding ulcer.

Q. Do you recall what Sheriff Tomblin said to you at the hospital there that night, sir? A. Yes, sir.

Q. Tell the Court and jury. A. He asked me how Janet was, so I said, "Well, how do you mean, how she is?" He said, "Well, you know a J.P. don't [503] make any money here without business," so I said, "Well, Janet will be all right then," because I had my money in and I wanted to win it. So I went ahead and let her go along. She came up later on.

MR. BECKETT: I'm sorry. I can't hear the witness, your Honor.

THE COURT: Would you speak out a little louder?

Q. Getting back to your conversation with Sheriff Tomblin and Cecil Elswick, you say they asked you how Janet was. Did Janet hold any official position there in the county or anything? A. She was the clerk at the Mount Gay precinct.

Q. Had she already been designated to be a clerk? A. Yes, sir.

Q. What were her politics? Was she a democratic clerk or a republican? A. She was democratic clerk.

Q. Were you running on the democratic ticket? A. Democratic ticket, yes, sir.

Q. You say Sheriff Tomblin asked you how she was? A. Was she going to go along in the election.

Q. Did you ask him what he meant by that? A. Well, I didn't have to because when he said, "If the [504] J.P. wins and he doesn't have any business, he can't make any money," so I pretty well knew.

Q. What did you understand by that? A. Well, if I did get elected it wouldn't do me any good because it's like being in business. If you don't have any business, you're not going to make it.

Q. What did he ask you with regard to Janet? A. With regard to Janet?

Q. Yes. A. During the time that he was there?

Q. Yes, sir. A. He just asked me how Janet was; how was she standing.

Q. How did she stand? A. Yes. To me it meant was she going to work for the Hager faction.

Q. Going to go for whom? A. Hager.

Q. The Hager faction? A. Yes, sir.

Q. Is that what you said, sir? A. The Hager faction; yes, sir.

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[524] Q. Came to Cabwaylingo? A. Yes, sir.

Q. Was this after the contest or before the contest? A. This was after the contest was over, but he came and told her—

Q. Did he talk to you? A. No, sir, he was talking to my wife.

Q. Were you present when he was talking to your wife? A. Yes, sir.

Q. What did you hear him say to your wife? A. Well, he was just talking about that we were going to get a

subpoena to the Circuit Court in Logan and he *preferred* Calvin Napier, if he changes his story in any way, they will get him for perjury right there, so we could kind of—my wife, she could take it what he meant.

MR. BECKETT: I'm sorry, your Honor. I can't hear.

THE COURT: He said his wife could sort of take it what he meant.

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[575] **Ermal Ellis**

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Upton:

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[597] Q. Did they tell you that you would get in any kind of trouble?

THE COURT: Wait a minute. This is Sullins and Elswick.

MR. UPTON: I'm sorry.

Q. Where did this take place? Was this while you were up in the jail or some other time? A. It was some other time.

Q. All right. Was there anything said about this at the evening that you were up at the jailhouse? A. No, sir.

Q. About whether you would get in trouble or not? A. No, sir, that was the next day.

Q. Did you have a meeting the next day with anyone? A. Well—

Q. The day you testified. A. Mr. Hager and Mr. Elswick and Elwood Sloan and his brother—I don't know his name—and they was a few more people up there.

Q. Where did this meeting take place? A. It was in the jail.

[598] Q. Did Mr. Hager say anything at that meeting? A. Yes. He said not to worry about it, we wouldn't get in

no trouble, his old man was a judge and there wouldn't be no trouble, and after that it would be all over.

Q. He said his old man was a judge? A. Yes, sir.

Q. Then did you go down and testify? A. Yes, I did.

Q. After you testified did you have occasion to have any conversation with Mr. Hager? A. No, I didn't. Was that after?

Q. After you testified at the contest. A. After I come out of the courtroom?

Q. Yes. A. I seen him in a jury room or something. I don't know what it was.

Q. Did he say anything to you? A. He said I done a good job of testifying.

Q. That was the defendant Hager, Red Hager? A. Mr. Hager, yes, sir.

Q. He said you did a good job testifying? A. Yes, sir.

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[616] **Cecil Elswick**

called as a witness on behalf of the Government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. King:

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[622] A. It was in the evening.

Q. What do you mean by the evening? A. Well, it had to be around 6, between 6 and 7 o'clock in the evening.

Q. What went on at that meeting, that first time you met with Mr. Hager? A. Well, Red Hager told me he knew I had been appointed as a republican election officer, commissioner, to serve in the house, and he wanted me to go along with them and if I didn't that he would cause me trouble.

Q. Did he tell you what he meant by going along with them? A. Go along and help win the Mount Gay precinct on election day.

Q. For whom? A. For the Okey Hager slate and Senator Byrd and Ken Hechler.

Q. Who else was on that slate, if you know? A. Charles Gilliam, House of Delegates; he was on it.

Q. Mr. Elswick, what else happened at that meeting? A. Well, he told me if I didn't go along that I had a car that was stole from me about a year before, that he was going to get me indicted, said he owned the judge in the Circuit Court [623] and he already had Earl Thompson and Tom Godby impeached, and if I didn't go along he would get me indicted through Oval Damron and the judge.

Q. What else happened? A. I said, "I'll lose my job at the State Road and everything like that."

Q. Were you working at the State Road at that time, sir? A. Yes, sir.

Q. Go ahead. What did you tell him about the State Road? A. I told him I would lose my job at the State Road if I went along because I was working for Neal Scaggs on the County Court, and he said they would work out a job, part-time deputy sheriff to start with. I said, "You can't give me that job. It would have to be Earl Tomblin," and he set up a meeting a couple of days later; him and me and Elwood met at Red's house.

Q. Who did what? A. He said he would set up this meeting down at his house for me and Earl so Earl would verify I would get the job, so me and Elwood Sloan drove down there, supposed to be there at 7 o'clock, but we had got there a little early and Earl Tomblin wasn't there so we drove on down to Okey Hager's house, Red Hager's father, because Red is pretty bad about lying, about promising things and not giving them to you.

[624] THE COURT: The jury will disregard that. Just tell what happened.

Q. At that meeting you say there was another meeting arranged with Mr. Hager and Mr. Tomblin. Is that correct? A. Yes, sir.

Q. When was it to take place? A. It took place at Red Hager's house.

Q. Was that Red Hager's house, and when with respect to the first meeting? A. Just a couple of days after the meeting that we had at the jail.

Q. I didn't hear you. A. It was a couple of days after the first meeting that we had at the jail.

Q. When did it take place with regard to time of day? A. Well, it was getting late in the evening because it was getting dark.

Q. All right, sir, and who did you say went to Mr. Hager's house with you? A. Me and Elwood Sloan. He was constable at that time.

Q. What happened when you got to Mr. Hager's house, and where is Mr. Hager's house, if you will tell the Court and jury. A. Mr. Hager's house is about two mile from where Red [625] lives down there, Chapmanville.

Q. Where is Mr. Red Hager's house? Is that where you went to first? A. Yes. Mr. Red Hager's house is up a hollow.

Q. Where? A. I forget the name of the hollow.

Q. Where? What is it close to? A. It's close to Chapmanville; about two mile from Champmanville.

Q. What happened when you got to Red Hager's? A. We got to Red Hager's house and Earl Tomblin had never showed up and we drove down to Okey Hager's house, to Chapmanville.

Q. Did you see Okey Hager? A. Yes, sir.

Q. How long were you at Okey Hager's? A. We was there about fifteen minutes.

Q. What did you do when you left Okey Hager's? A. We drove back up to Red's house and Earl was there then, and instead of us going to the house, we went out to the side of the house, the washhouse.

Q. Where? A. At the side, at the washhouse, where they have the [626] washing machines and things, and we talked about the job and Earl agreed to the job and everything, that I would get it, and I was supposed to have got it five days after the primary election.

Q. What job are you talking about? A. Deputy sheriff.

Q. Who was there? A. Me and Elwood Sloan, Earl Tomblin and Red Hager.

Q. Go ahead. A. And I had my election officer slip that I would serve as election officer then, the refusal slip whether you will serve or you won't serve, and we discussed the job and Red asked me to sign it and I give it to him to turn in.

Q. Did you sign it? A. Yes, sir, I signed and marked it that I would serve.

Q. Who did you give it to? A. Give it to Red Hager.

Q. Did anything else or any other discussions occur there at that meeting at the washhouse? A. Yes, sir. The discussion come up about the summer uniform and Red told me he would give $20 on it and Elwood said he would give $20 on it.

Q. Summer uniform for what? [627] A. For deputy sheriff uniform for me.

Q. For you? A. Yes, sir. You had to buy them.

Q. Sir? A. Yes, sir. You had to buy the summer uniforms.

Q. When were you supposed to get the deputy sheriff's job? A. Red said I would get it five days after the election, as soon as the County Court met.

Q. Was there any discussion as to what you were supposed to do in order to get this job? A. I was supposed to help win the Mount Gay precinct.

Q. Sir? A. I was supposed to help win the Mount Gay precinct.

Q. Was there any discussion as to what you were supposed to do to help win it? A. We got into that later at another meeting.

Q. Was there anything else discussed at that meeting there in the washhouse? A. Yes, sir. Red said I should quit the job up at the State Road and not go back up there.

Q. Did you do that? A. Yes, sir.

Q. How long did that meeting last, if you recall? [628] A. It lasted about I would say thirty minutes.

Q. All right, sir. What did you do after that? A. After the meeting was over?

Q. Yes. A. We drove back to Logan and I went home.

Q. Did you have any other occasions prior to the election to discuss the primary election to discuss the primary election with Mr. Hager or Mr. Tomblin? A. Well, the first time anybody discussed the election was me and Bernard Smith. He told me how to win the election. He was down in the sheriff's office in the daytime.

Q. When was this? A. That was after we had the meeting at Mr. Hager's house about the job.

Q. How long after that meeting? A. It was about maybe three or four days afterwards.

THE COURT: How long before the election was it? Do you recall?

THE WITNESS: It was around close to three weeks, I would say.

Q. Mr. Elswick, where was it, now, you saw Mr. Smith? A. At the sheriff's office when they was wondering about how to win the Mount Gay precinct and Bernard—that's the first time he told me to do away with the poll slips . . .

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[633] . . . to see me or Earl Tomblin, one, and as soon as the meeting was over we went down on the elevator and after we got through discussing the meeting and everything me and Earl drove to the Holden Hospital to see Garrett to try to get Garrett's wife to go along with illegal voting at the Mount Gay precinct.

Q. Did anything else occur at the meeting before you left to go to the hospital? A. Downstairs in the basement.

Q. Slow down and speak a little louder. A. Downstairs in the basement Elwood Sloan was worrying about getting double-crossed, Bob Davis and all of them was double-crossing him, wasn't going to back him in the election for constable, and he asked Earl and Earl assured him he was

being backed by the faction and everything, and Elwood said, "I still don't think you are all going to back me," and he promised Elwood Sloan a part-time deputy job if he lost the election.

Q. Who is he? A. Earl Tomblin, Sheriff of Logan County.

Q. You say Mr. Browning was at that meeting? A. Mr. Browning was at that meeting and when we walked outside to the door there he said, "Cecil, put them on there but don't put enough on there to get in any trouble." He meant [634] don't put all the registration book where I could get in trouble and they could catch it easy.

Q. Mr. Elswick, you say after the meeting you went to the Holden Hospital? A. Yes, sir.

Q. With whom? A. With Earl Tomblin.

Q. What did you do over there? A. We went up to the hospital and he told the nurse he was the Sheriff of Logan County and he wanted to see Garrett, and it was late, about 10 by the time we got there. She said, "Go on back and see him," and we went back to see Garrett and asked what was wrong and he said—

Q. You don't have to testify to what Garrett said. You just testify as to what Mr. Tomblin said and what went on. A. Earl Tomblin told Garrett not to worry about losing the election, that they had him slated and everything and they was for him and if he would get his wife to go along with the illegal voting he would win the Mount Gay precinct and others too, and Garrett agreed to do this, and Earl told him, "What good is the J.P. without the Sheriff to give you some business?"

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[639] Q. Speak up a little more and more slowly. A. I would go with her and we had it arranged when we got in the machine with the voter we would make sure that the voter was in the middle and we was on each side of the voter, and they would say this is the way they wanted to vote. I kept the slate over there with me and I just voted

my slate. If they wanted to vote for Neal Scaggs, we would vote them for Okey Hager unless we thought one would catch us, and if we thought they would catch us we would vote the way they wanted to vote.

Q. Mr. Elswick, did you put any illegal votes on those machines that day? A. Yes, sir, we did.

Q. How many? A. I lost count at about ninety. It was over a hundred. I lost count that evening and we put more on after I lost count, so it was over 100 votes.

Q. Who were you putting those votes on there for? A. I was putting them on there for Senator Byrd and Ken Hechler and Okey Hager slate, Leroy Counts, House of Delegates, Charles Gilliam, and all their slate.

[640] Q. Who else? A. Elwood Sloan, who was running for constable, and Garland Bertram, school board member.

Q. Who was running for J. P.? A. Garrett Sullins. Put them on there for Garrett. He carried the precinct bigger than anybody.

Q. Mr. Elswick, when during the day did you put these votes on the machine? A. Well, one machine was broke down part of the time. I think all we got on it was around thirty-two votes and we hurried up and got all the voters we had in there to vote as quick as we could and we started putting the illegal votes on. As soon as there wasn't anybody waiting to vote or anything we started putting the illegal votes on the machines.

Q. Did you put the absentee votes on it that day? A. Yes, sir.

Q. How many altogether did you put on? A. We put fifteen to start with and I think it was three John R. Browning brought later over to the precinct.

Q. Mr. Browning came over there and brought some? A. Yes. I think it was three.

Q. How was the turnout there that day? A. It rained about all day. The turnout was fair to be [641] raining.

Q. Sir? A. The turnout was fair to be raining. It rained hard all day just about.

Q. How many people actually voted there that day, if you know? A. It couldn't have been over 250, I don't think.

Q. Mr. Elswick, what time of day did the polls close? A. They closed at 7:30 that night.

Q. Were you there when the polls closed? A. Yes, sir.

Q. What happened when the polls closed, after the polls closed? Tell the Court and jury. A. Well, we closed the polls and started to get ready to go back and take the tally off the machines and Junior Gaylock, Neal Scaggs' precinct captain, wanted to come in, and we wouldn't let him in. He showed us a slip on behalf of Neal Scaggs where he could come in, which was legal for him to come in, and Mae Stollings started raising cain and threatened to go home before we got counted up and I asked if it was all right for him to come in and she said no, and we put him back outside.

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[648] A. Well, we were subpoenaed to come before the contest. Neal Scaggs subpoenaed us first.

Q. Before you were subpoenaed did anything happen? A. Yes, sir. I asked Earl and Red and them about my job and they said they couldn't give it to me because the contest was going on; it would look bad if they gave it to me then.

Q. Did you ever see the election officers before the contest started? A. Yes, sir.

Q. When? A. Well, they called all the election officials up at Earl Tomblin's office. Earl was there and Red Hager was there, and tell them, you know, to stick to their stories and things that they had told about, you know, the precinct and about the crowd milling in there, telling anybody could have got the poll slips, and things like that.

Q. Mr. Elswick, when was this? How long before the contest started was this meeting you say the precinct officers had with Mr. Tomblin and Mr. Hager? A. It wasn't too long before it started. . . .

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[654] Q. How do you know she came in there and swore she heard bells ringing? A. Okey Hager told us she heard bells ringing when I was the only one in there putting votes on the machine.

Q. What day was this? Was that the day you were in that room? A. Yes, sir; the first day.

Q. What time of day was it, if you recall? A. I don't remember what time it was.

Q. You say Mr. Hager came up there? A. Up there where they had the election officers, me and Mae Stollings and Janet Sullins and Calvin Napier.

Q. What did Mr. Hager say? A. Said she swore—

Q. Said who swore? A. Essie Stollings; this woman swore that she heard bells ringing and I was the only one in the voting place, in the voting room there, and she was standing out in the hall and she heard bells ringing and I was the only one that came out of the room.

Q. What happened then? A. I said, "Get a false swearing warrant for her for [655] swearing a lie."

Q. Who said that? A. I did, and maybe that would slow them down, and Red and them agreed that it probably would.

Q. Who was there? A. I told Red and Bob Davis and the rest of the election officers that.

Q. Who else was there when you said that, if you recall? A. Earl Tomblin was there.

Q. Was Calvin Napier? A. Calvin Napier was there, yes, sir.

Q. Did he take part in the conversation? A. Calvin Napier was going to get the warrant but Red figured it was me she swore the lie on, for me to go and get the warrant myself.

Q. Did you go get the warrant? A. Yes, sir, I did.

Q. Who did you get it from? A. Luther Ghiz.

Q. Is he a justice of the peace? A. He was then.

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[667] Q. Mr. Elswick, do you recall when the contest ended with regard to time? A. No, sir, I don't.

Q. You don't. After it was over with what did you do? A. You mean after the contest was completed and everything?

Q. Yes, sir. A. I didn't do nothing. I just asked them for the job that they had promised me.

Q. Asked who? A. Asked Earl Tomblin for the job that he and Red had promised me that night down at his house, and he said they couldn't give it to me right now, that I would have to wait, and they gave me $100 a month until they could work the job out the first of November.

Q. Who gave you $100? A. Earl Tomblin gave me $100 a month, except Red Hager gave it to me two times up in the jail.

Q. Was this cash or check? A. It was all cash.

[668] Q. Did you ever get your sheriff's job? A. I got it the first of November part-time.

Q. Prior to getting your sheriff's job did anything happen with respect to the election? A. Yes, sir. Earl and Red and Bernard and them got scared that the witnesses might talk to the federal authorities and Earl and Red had talked to the Prosecuting Attorney, Oval Damron. They told me that they talked to the Prosecuting Attorney, Oval Damron. Anyway, they got out subpoenas to call the grand jury and I was down there at the sheriff's office. I had been put on full-time at that time and the subpoenas came down. I wasn't supposed to have got them but the girl that brought them down, the secretary that brought them down, she reached them to me because Dutch Barber, who was the desk clerk, was out and I went through them and seen they were calling the election officers and I got to figuring they was calling the grand jury for the election.

So Earl Tomblin came up to the jail that evening and I got him cornered and I asked him, I said, "What's going on?" He said, "Nothing." He said, "Why?"

I said, "You have got subpoenas for everybody in the Mount Gay precinct. What's going on? I want to know."

He said, "Me and Red talked to Oval Damron, the [669] Prosecuting Attorney, and we agreed to call the grand jury." That way people that went in before the grand jury, all the election officers would have to stick to the testimony they had given down at the contest, and if they didn't they would be got for perjury and put in jail.

Q. Who told you this? A. Earl Tomblin.

Q. When did this occur? A. That was the January term of the grand jury, when it met.

Q. In January? A. I believe it was in January, yes.

Q. You say you had gone to work over there as a deputy sheriff the first of November? A. Yes, sir. I served a summons on Elwood Sloan.

Q. But had you been working from November until that time? A. Yes, sir.

Q. Mr. Elswick, did you ever talk to the FBI about this matter? A. When I found out they was calling the grand jury I called the FBI.

Q. Prior to that did you talk to the FBI? [670] A. Yes, sir.

Q. Do you recall when? A. It was before I went on the deputy force.

Q. Before the first of November? A. Yes, sir.

Q. Who did you talk to with the FBI? A. Talked to Calvin Knott and some guy called Duke or something like that.

Q. What did you tell them?

THE COURT: Wouldn't that be self-serving?

MR. KING: All right.

Q. Mr. Elswick, how long did you serve on the deputy force over there? A. I served until I come up here to appear before the grand jury.

Q. Till you came where? A. Till I came up to Charleston in Kanawha County to appear before the grand jury to give testimony.

Q. Do you remember when that was? A. No, I don't remember the date.

Q. What happened then? Did you quit? A. Yes, sir. I asked one of the girls that worked in the office if she would type up my resignation for me and I quit [671] and mailed it from up in Charleston.

Q. Who did you mail it to? A. I mailed it to Sheriff Earl Tomblin.

Q. Mr. Elswick, before you testified before the grand jury up there was there any indication given to you as to whether or not you were going to be prosecuted?

MR. BECKETT: Objection.

A. Yes, sir.

THE COURT: Overruled.

MR. BECKETT: I'm sorry. I will withdraw it.

Q. Sir? A. Yes, sir.

Q. What was that? A. At the same time I asked Earl what was going on, he told me well, they were calling the grand jury so that all the people would have to stick to their story that they had given down at the contest or entered statements and everything, and said if they changed it not only would they be prosecuted, but if I changed mine and told the government authorities the truth I would be put in jail, or if I told the authorities what happened to the poll slips.

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[684] CROSS-EXAMINATION

BY MR. BAER:

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[744] Q. On this election you took the oath as a republican commissioner, did you not? A. Yes, sir. We didn't swear, hold our hands up and swear to it. We just signed it that evening.

THE COURT: Well, you knew you were signing an oath?

THE WITNESS: Yes, sir.

Q. You had intended to sign it, didn't you? I am going to ask you if that oath doesn't say that "I, Cecil Elswick, do solemnly swear that I will support the Constitution of

the United States and Constitution of the State, and that I will faithfully and impartially discharge the duties of commissioner assigned by law," and then other statements in there. Does it not contain that? A. Yes, sir.

Q. You have taken that oath four times before this. Did you ever once in your life fulfill the oath that you took as an election official? A. There isn't an election officer in Logan County that can fulfill that oath.

THE COURT: Just answer the question.

Q. I am asking you if you ever fulfilled your oath as an election official.

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[804] **Thomas A. Tomblin**

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Upton:

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[806] Q. I hand you now, Mr. Tomblin, what has been admitted in evidence as Government's Exhibit Number 26 and ask you if you will identify that for us, sir. A. This is an order to the court from Mr. Tomblin stating that Cecil Elswick has been appointed part-time deputy.

Q. All right, sir. What is the date of that sir? A. The date of this is November 1970.

Q. Government's Exhibit Number 26 reflects official action by the County Court of Logan County. Is that correct? A. That's their approval, where he was appointed.

Q. Who signed Government's Exhibit Number 26 on behalf of the County Court, sir? A. O. L. Hager.

Q. I hand you what has been admitted in evidence as Government's Exhibit Number 27 and ask you if you will identify that for us, sir. A. This is the standard payroll for the county where the gross salary less the deductions—where the check is written from the payroll records.

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[857] **Janet Sullins**

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Upton:

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[880] Q. Was there anybody else in there? A. There was the ones that worked in the election plus Mr. Sloan I believe was there.

Q. I'm sorry. Elwood Sloan. Did you all talk in that room? A. Yes, sir.

Q. What was the subject of your conversation that day, if you recall? A. Not to forget to say that Garrett had voted between 2 and 2:30 or 2:30 or 3, along there somewhere.

Q. Who was doing the talking? A. We all was at that time, and not forget the two names of Crosses and Copach.

Q. Did Mr. Hager ever say anything to you about this, what you have just testified? A. The only thing, after we discussed what would be said when we went downstairs, they told us not to worry, that the County Court and the Sheriff's department and Prosecuting Attorney would be behind us and nothing wouldn't come of it.

Q. And who said that? A. Earl Tomblin.

[881] Q. What if anything did Mr. Hager say? A. He said something about his father with the County Court.

THE COURT: Mrs. Sullins, tell me something. You say you got a subpoena to appear as a witness in the election contest. Mr. Staker I believe you said brought it out to you.

THE WITNESS: Yes, sir.

THE COURT: And you went down to the Courthouse in Logan the day that you were supposed to respond to the subpoena.

THE WITNESS: Yes, sir.

THE COURT: How did you happen to go to this room?

THE WITNESS: Well, we may have went in the Courthouse and been sitting there, like the courtroom, and someone mentioned going upstairs.

Q. Do you recall who mentioned that to you? A. No, sir.

MR. BECKETT: Objection, your Honor. She said they may have gone there. She didn't say someone did.

THE COURT: She doesn't recall anyway.

Q. Was there anything else discussed at this meeting you had in the Courthouse? A. That was all that I could remember, just for me not to forget about Garrett, Copach and Crosses. * * *

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[892] * * * I knew it a week, it seemed like. When Mr. Tomblin came, he came with one of his employees in his own personal car, which we had a pool table in the back room, and the man was getting the money out.

Mr. Tomblin and I were talking and he mentioned that I should be subpoenaed again and he brought the name of Calvin Napier up, that if Calvin changed his testimony from the first time that we had the trial he would be got for perjury right there on the spot. I took it for granted that was for me and my husband.

MR. BECKETT: We object to what she took for granted, your Honor, and move to strike.

THE COURT: Overruled.

Q. Go ahead. Were you through? A. While he was telling me this it did scare me in my own self and I kept talking to him and I did sell him some license.

Q. What kind of license? A. I believe they were fishing and hunting combined, if I'm not mistaken.

Q. Did I ask you to bring that record with you here today? A. Yes, sir.

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[895] Cross-Examination

By Mr. Greene:

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[920] Q. And at that time you took the oath to handle the election, did you not? A. Yes, sir.

Q. And the oath you took was, "I do solemnly swear that I will faithfully and honestly discharge my duties as clerk, so help me God." A. Yes.

Q. And that was an oath. You understood that you were to see that the election was carried on honestly and fairly. Isn't that true? A. Yes, sir.

Q. But you had no intention of doing that, did you? A. No, sir.

Q. When you got in the polls with the other officials did you discuss this with Mr. Elswick? A. Just what I told you a while ago was said.

Q. What did you say? A. That he asked me had I talked to Garrett.

Q. Talked to whom? A. Garrett; my husband.

Q. And did he say anything else to you about handling the election? A. I didn't even know how to vote people hardly • • •

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Government's Closing Statement

[1787] By Mr. King:

I think from the evidence you can conclude by now that the theory behind the government's case actually is that these votes were cast and counted by going through the contest and all in order to get Okey Hager elected to the County Court, [1788] in order to get Red Hager's father elected to the County Court, that these defendants, along with others, got the votes cast and got the votes counted in the long drawn-out procedure that was involved over there.

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By Mr. Upton:

[1848] You saw Cecil Elswick. I challenge you, there's a letter in this evidence that Cecil Elswick wrote. You read that letter when you go to your jury room and you determine whether Cecil Elswick was smart enough to think all this up. You read that letter of Cecil Elswick's.

And they said where's Elwood Sloan? He's in prison. We didn't bring him in here. Neither did they.

Why did they want Mount Gay? Was a constable's job that important, or was that man's father's position on the County Court that important? What does the County Court of a county do? Well, they control his budget, and they control his budget, and they control his budget (indicating), and they hire all the deputy sheriffs on the recommendation of the Sheriff, and he recommended Cecil Elswick and the County Court approved it. The County Court controls the county political power and patronage.

Did Cecil Elswick and Elwood Sloan do this to get a constable's job, or was it done to get his father elected to the County Court? Control of the county purse strings, control of political patronage, control of perpetuation in office.

Now listen to the Court's charge. The Court is going to tell you something very important in his charge and that's [1849] in regard to the joining of a conspiracy. Let's assume for the purpose of argument for a minute that the coon hunters or the coon—whatever they were, the people that watch the coons—let's assume this is all right for the purpose of argument.

Let's assume there was a meeting up there the night before the election, but listen to the Court's charge in regard to what happens if an individual joins a conspiracy after it's already started. Let's assume that Cecil Elswick and Elwood did start this conspiracy. What happens if these defendants joined in at the election contest? Listen

to the Court's charge. I think the Court will tell you if they knowingly joined in, knowing what had happened, then they are equally answerable as everybody else.

And Mr. Beckett told you about the red flag. Where were the poll slips when they opened up the bucket? Didn't that raise a red flag? There's the high Sheriff of Logan County, the chief law enforcement officer of Logan County. What happened to the red flag? It got shoved under the rug.

Look at the election contest. Cecil told you they were in and out of that jail all the time, stirring up the witnesses, getting the lie swearers, swear them on, swear them off. Did Cecil Elswick have free run of the Logan County Sheriff's office and the jail? There's the high Sheriff. [1850] There's his deputy. (Indicating) Who had control of the Sheriff's office? Cecil Elswick? He was a republican.

Did they join in at the election contest? Assuming arguendo there wasn't a meeting, the coon hunters were right. You may conclude from this evidence that they joined in at the election contest. And why would they join in the election contest? To get Elwood a constable's job? Or to get his dad elected to the County Court? The power, the patronage, the money. To get a constable's job?

And the question of power, the control of the party in Logan County. In May 1970 that man was the chairman of the Democratic Executive Committee. There's the co-chairman. There's the treasurer. That man's mother was a member of the committee. (Indicating) A deputy sheriff, Bob Davis, whose name has come up through here, he was a member of the committee, and that committee hired a lawyer, Mr. Jacobs, who came in here and he couldn't even remember who his client was, and he conducted a whole election contest over in Logan County without ever consulting anybody except Cecil and Elwood.

Funny client. And they paid him out of the coffers of the Democratic Executive Committee. Power. Control. Patronage. All for Elwood Sloan's constable job? Or all for a seat on the County Court, an opportunity to run in the [1851] general election for his father?

Br. Bernard Smith appeared at the recount and the canvass and they never could find out from his secretaries who his client was, but he was over there taking notes, kept notes, but Mr. Jacobs didn't remember whether he turned them over to him or not. He didn't know.

You will recall the testimony of Mr. Elswick, I believe it was, who said that about the time that this election contest started Elwood Sloan got himself indicted and he had little interest in the election contest. For Elwood's constable's job they had an election contest? Or was it to get his father the nomination for the County Court seat?

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Excerpts from the Charge of the District Court

[1865] This case involves an alleged conspiracy and I should instruct you briefly as to the manner in which you should view the testimony of a co-conspirator. I think Mr. Beckett in his argument went a bit too far when he said that my charge would indicate that the Court considered this tainted evidence. It is not tainted evidence but it is evidence that should be scrutinized in the fashion in which I shall tell you.

As I said, this case involves an alleged conspiracy and the government has presented as a part of its case the testimony of Calvin Napier, Janet Sullins and Cecil Elswick, each of whom I instruct you is a co-conspirator, although not named as a defendant.

In addition to these three witnesses you might, if you saw fit, also conclude from the evidence that other witnesses who have testified here either for the government

or the defense would be co-conspirators in the event you found beyond a reasonable doubt that a conspiracy in fact did exist.

[1866] You are instructed that the testimony of co-conspirators must be received with great care and caution, and if you believe the testimony of an alleged co-conspirator was false and that he was induced to testify falsely either by fear of punishment or hope of reward, you may, if you see fit, disregard that testimony in its entirety.

You are further instructed that the testimony of a co-conspirator in crime, that is, a person who actually commits or participates in the commission of a crime, is admissible in evidence, yet the evidence of a co-conspirator in crime as to matters material to the issue, that is, matters connecting the defendants with the commission of the crime as charged against them, ought to be received with great caution by the jury before you should convict on such testimony.

The indictment in this case charges in substance that beginning on or about the 1st day of May, 1970 and continuing until on or about the date of the indictment the defendants unlawfully, willfully and knowingly conspired with each other and with other persons who are both known and unknown to the grand jury, to injure and oppress the qualified voters of Logan County in the free exercise and enjoyment of certain rights and privileges secured to them by the Constitution and the laws of the United States, that is, the right to vote and [1867] to have such votes cast, counted, recorded and certified at full value.

The indictment also alleges that in order to effect the objects of the conspiracy the defendants caused and attempted to cause votes to be cast in the Mount Gay precinct of Logan County by procedures and methods in violation of the laws of the State of West Virginia, all with the purpose and intent that the illegal, fraudulent and fictitious ballots would be counted, returned and certified as a part

of the total vote cast in the May 12, 1970 primary election, thereby impairing, diminishing, diluting and destroying the value and effect of votes legally, properly and honestly cast in that primary election in Logan County, which the indictment alleges violates Title 18 of the United States Code, Section 241.

The statute cited in the indictment provides in part that it shall be a criminal offense for two or more persons to conspire to injure any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. You are instructed that the right to vote and the right to have the value of that vote undiminished and undiluted by the presence of illegal votes is a right guaranteed by the Constitution and laws of the United States within the context of the charging statute.

[1868] The indictment in this case states that the defendants caused false and fictitious votes to be cast and counted, and that casting and counting such votes violates the laws of the State of West Virginia. With regard to whether or not casting and counting false and fictitious votes or causing them to be cast and counted violates West Virginia law, you are further instructed that the laws of the State of West Virginia are violated when fictitious votes are cast and counted or caused to be cast and counted.

The government in essence contends that these defendants, along with other co-conspirators not named as defendants in the indictment, including Elwood Sloan, Cecil Elswick, Calvin Napier, Mae Stollings, Minerva Richards, Janet Sullins and perhaps others, did unlawfully, willfully and knowingly conspire together and with each other to violate the law of the United States in causing or attempting to cause votes to be cast in the Mount Gay precinct of Logan County, West Virginia in the May 1970 primary election by procedures and methods in violation of the laws of West Virginia pertaining to the handling of a precinct

by election officials, and by further causing and attempting to cause the County Court of Logan County, West Virginia, to find that no illegal votes were cast in the Mount Gay precinct by soliciting perjury and the commission of [1869] perjury in an election contest held subsequent to the May 12, 1970 primary, all with the purpose and intent that the alleged illegal and fraudulent and fictitious votes would be counted as a part of the total vote cast, resulting in an impairment, lessening and dilution of the value and effect of the votes legally and honestly cast. The government contends, of course, that all this was done in violation of Title 18, Section 241 of the United States Code, the charging statute designated in the indictment.

As I have said, the indictment charges and the government takes the position that a conspiracy existed between these five defendants and possibly other persons known and unknown to the grand jury.

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. A conspiracy, in other words, is a kind of partnership in criminal purposes in which each member, once a conspiracy comes into existence, becomes the agent of every other member of the conspiracy.

The gist of the offense is a combination or agreement to disobey or to disregard the law. Mere similarity of conduct among various persons and the fact that they may have assembled together and discussed common aims and interests does not [1870] in itself necessarily establish proof of the existence of a conspiracy.

The indictment, as I have stated, charges a conspiracy among these defendants and others who were known to the grand jury but not named in the indictment, and also others who were not named in the indictment because the grand jurors did not know who they were.

An individual, a person, cannot conspire with himself and therefore you cannot find any of the defendants guilty unless you find beyond a reasonable doubt that he participated in a conspiracy as charged in the indictment with at least one other person, whether that other person was a defendant or not and whether named in the indictment or not.

You must consider the guilt or innocence of each of these defendants separately. With this qualification you may find all of the defendants guilty or all not guilty, or you may find one guilty and four others not guilty, or any two guilty and three others not guilty, or any three of the defendants guilty and the other two not guilty, or any four of the defendants guilty and the fifth not guilty, or as I have said, you may find all five not guilty in accordance with the instructions and the facts that you find.

One may become a member of a conspiracy without full [1871] knowledge of all of the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator. Before the jury may find that a defendant or any other person has become a member of the conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defendant or other person who is claimed to have been a member willfully participated in the unlawful plan and with the intent to advance or further at least one of the objects or purposes of the conspiracy.

To act or participate willfully means to act or participate voluntarily and intentionally and with specific intent to do something the law forbids or with specific intent to fail to do something the law requires to be done, that is to say, to act or participate with a bad purpose either to disobey or to disregard the law.

And so if you find beyond a reasonable doubt that a defendant or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant, he becomes a conspirator, and one who willfully joins an existing conspiracy [1872] is charged with the same responsibility as if he had been one of the originators or instigators of the plan.

In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of the other participants until and unless it is established, one, that a conspiracy existed, and, secondly, that he was one of its members.

However, the evidence in this case need not show that the members entered into any express or formal agreement or that they directly by words spoken or in writing stated between themselves what their object or purpose was to be or the details thereof or the means by which the object or purpose was to be accomplished.

What the evidence in the case must show, ladies and gentlemen, beyond a reasonable doubt in order to establish proof that a conspiracy existed is that the members in some way or manner or through some contrivance positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

Whenever it would appear beyond a reasonable doubt [1873] from the evidence in the case that a conspiracy as defined in this charge existed, and that any defendant was one of the members thereof, then the statements thereafter knowingly made and the acts thereafter knowingly done,

by any person likewise found to be a member of the conspiracy, may be considered by you, the jury, as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in his absence and without his knowledge, provided such statements and acts were knowingly made and done during the continuance of the conspiracy, and in furtherance of one of its objects or purposes.

Otherwise, any admission or incriminatory statement made or act done by one person may not be considered as evidence against any person who was not present and did not hear the statement made.

Therefore, a statement or act of any conspirator, not in furtherance of the conspiracy, or made or done before its existence, or after its termination, may be considered only as evidence against the person making the statement or committing the act.

In applying this principle of law, if you conclude beyond a reasonable doubt that there was a conspiracy as charged in the indictment and that one or more of the defendants joined [1874] in that conspiracy with any other person or persons, whether or not named in the indictment, then any act done or statement made in furtherance of the conspiracy by any person you find to have been a member of it, may be attributed to any of the defendants who you find from the evidence beyond a reasonable doubt was a member of the conspiracy at that time.

The names of numerous individuals have arisen in this trial who you may possibly consider to be unnamed conspirators in the within indictment, and only as an example, the individual known as Elwood Sloan, or any other witness or person whose name has arisen in the presentation of the evidence in this case, may be considered by you, based upon this charge, as a possible unnamed conspirator. But you should always keep in mind that the burden of

proof rests upon the government to prove beyond a reasonable doubt that a particular person was a co-conspirator.

The Court further tells you that intent is an essential element of this offense. You are therefore charged that before you can convict the defendants, or any of them, you must believe beyond a reasonable doubt that such defendant or defendants deliberately and with knowledge conspired with others to injure certain qualified voters in the free exercise and enjoyment of their right of suffrage.

[1875] Now, it is a legal presumption that people intend the natural and probable consequences of their acts, and also that they know that the right of legally qualified persons to vote is a federally Constitutionally protected right, and consequently, if any one or more of the defendants conspired knowingly and intentionally with another defendant or with a co-conspirator to produce the casting and counting of illegal ballots in the 1970 primary election, with the intention of injury or oppressing citizens in the free exercise of their voting rights, they would be guilty as charged in this indictment.

You are instructed that an act is done knowingly if done voluntarily and intentionally, and not because of mistake, accident or other innocent reason.

In addition, an act is done willfully if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

And so, ladies and gentlemen, the essential elements of this offense which must be proven in order to establish the offense charged in the indictment against these defendants is, first, that the conspiracy described in the indictment was willfully formed and was existing from on or about May 1, 1970 [1876] through the conclusion of the election contest in the month of August 1970; second, that there

were two or more members of this conspiracy; third, that the object of the conspiracy was to injure citizens of the United States in the free exercise or enjoyment of their right to vote and to have such vote or votes honestly cast and counted without being diluted by false and fictitious votes.

Your verdicts, ladies and gentlemen—and there will be five forms of verdicts—must represent the considered judgment of each juror. In order to return your verdicts it is necessary that each juror agree thereto. In other words, your verdicts must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors.

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[1879] The fact that you have not gone to the jury room and will not participate in their deliberations in reaching a verdict does not mean you have not rendered valuable service to the Court. You have. It was comforting to know if something untoward occurred we had some bench strength on which we might call in that event. You may now be excused.

Now, gentlemen, we will note on the record that one alternate has left the courtroom and the other alternate, Miss Hinkle, just came out of the jury room, so I assume we have the twelve jurors.

Any objections or exceptions?

MR. BECKETT: Your Honor, we have a motion to make.
THE COURT: But you have no objections or exceptions?
MR. BECKETT: Except as already stated.

THE COURT: Does the government want to make any futile effort?

Mr. UPTON: No, your Honor.

THE COURT: Except this. I point out, Mr. Beckett, [1880] in addition to the matters we discussed in the requests for charges in chambers this morning, any point that you want to save, if any you want to, with respect to the charge should be stated on the record at this time. I assume you have none?

MR. BECKETT: We have no additional objections, your Honor, at this time. I understood the record this morning stated our objections.

THE COURT: But that was what I was cautioning you. You should state your objection now to get it on the record.

MR. BECKETT: The only objection Mr. Baer and I think should go on the record is those portions of the instructions that contend that the conspiracy could still exist or did exist or evidence of the conspiracy after the certification, which for the purpose of the record I believe could be stated was approximately May 27th, 1970. I think that would be saved by our motion also.

THE COURT: It probably would be. What I was trying to explain to you, those Judges down in the Court of Appeals have the effrontery to refer to all that agony we went through this morning as informal proceedings, and to save your point, and you can get mouse-trapped on it, you have to give it in open court at the conclusion of the charge.

MR. BECKETT: That particular point is the only [1881] point we wanted to save. The Court straightened out the other point.

THE COURT: Yes. How about you, Mr. Upton, or Mr. King?

MR. KING: No objection.

MR. UPTON: It is rather academic, your Honor.

THE COURT: They have another motion. Go ahead.

MR. BECKETT: Your Honor, there are two matters we would like to take up with the Court and show our objection on the record. Number one, Mr. King in his closing arguments made a statement and I wrote down, "What do the defendants say," which of course would be a direct reference by the government to the defendants' failure to take the stand.

We would move for a mistrial on that basis. I don't know how the Court could straighten it out, frankly. It would cause more emphasis if it were brought to the jury's attention probably.

MR. UPTON: Your honor, I'm not sure that was the exact quote but it was something very similar to that—

THE COURT: It was.

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

No. 9520

UNITED STATES OF AMERICA

v.

WILLIAM N. ANDERSON

Judgment

On this 14th day of October, 1971 came the attorney for the government and the defendant appeared in person and by Philip A. Baer, Esq. and W. Stanley James, Esq., his counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty returned by a jury on the 13th day of September, 1971, has been convicted of the offense of violation of Title 18, Section 241, United States Code, as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

No. 9520

UNITED STATES OF AMERICA

v.

JOHN R. BROWNING

Judgment

On this 14th day of October, 1971 came the attorney for the government and the defendant appeared in person and by Philip A. Baer, Esq. and W. Stanley James, Esq., his counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty returned by a jury on the 13th day of September, 1971, has been convicted of the offense of violation of Title 18, Section 241, United States Code, as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

No. 9520

UNITED STATES OF AMERICA

v.

ERNEST L. "RED" HAGER

Judgment

On this 14th day of October, 1971 came the attorney for the government and the defendant appeared in person and by Philip A. Baer, Esq. and W. Stanley James, Esq., his counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty returned by a jury on the 13th day of September, 1971, has been convicted of the offense of violation of Title 18, Section 241, United States Code, as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

No. 9520

UNITED STATES OF AMERICA

v.

W. BERNARD SMITH

Judgment

On this 14th day of October, 1971 came the attorney for the government and the defendant appeared in person and by Philip A. Baer, Esq. and W. Stanley James, Esq., his counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty returned by a jury on the 13th day of September, 1971, has been convicted of the offense of violation of Title 18, Section 241, United States Code, as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

No. 9520

UNITED STATES OF AMERICA

v.

EARL TOMBLIN

Judgment

On this 14th day of October, 1971 came the attorney for the government and the defendant appeared in person and by Philip A. Baer, Esq. and W. Stanley James, Esq., his counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty returned by a jury on the 13th day of September, 1971, has been convicted of the offense of violation of Title 18, Section 241, United States Code, as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

SUPREME COURT OF THE UNITED STATES

No. 73-436

WILLIAM N. ANDERSON, ET AL., *Petitioners,*

v.

UNITED STATES

Order Allowing Certiorari.

Filed December 10, 1973.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.